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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 377

SAMUEL M. LEVY,

Petitioner,

against

LEWIS M. DABNEY, JR., as Trustee of Associated Gas and Electric Company, Debtor, etc.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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Dated: New York, N. Y., October 5, 1951.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Samuel M. Levy, respectfully prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit which in an opinion affirmed a judgment of the District Court for the Southern District of New York for the plaintiff trustee in reorganization proceedings in an action brought in 1948 to recover money paid to the defendant in 1938 for his services as accountant rendered in a shareholder's action brought against the plaintiff's corporate predecessor.

A certified transcript of the record in the case, including the proceedings in said Court of Appeals, is furnished herewith in accordance with the rules of this Court.

Statement

On April 25, 1936, defendant, an accountant, entered into an agreement with one Milton I. Milvy (Plaintiff's Exhibit 2, R. 47-48) under which defendant was to do accounting work in certain stockholder's derivative actions, in consideration of which Milvy, the attorney in said actions, was to pay him one-third of his gross fees. A subsequent agreement of January 4, 1938 (Plaintiff's Exhibit 3, R. 49-50) reembodied the old agreement. Defendant's obligation consisted only of rendering accounting services and giving consultation in the event of settlements. There is no provision giving defendant any control over such settlements. Defendant never worked on such stockholder's suits except after a specific request from Milvy (R. 16-17, 22).

Pursuant to such agreements, defendant rendered such services in a stockholder's derivative action against certain directors and officers of Associated Gas & Electric Company, plaintiff's corporate predecessor, hereinafter called "AGECO", and the defendant received $6,000 from Milvy with knowledge that it was being paid to him as part of the proceeds (approximately one-third) of the settlement of the said action, in four payments during the year 1938 (R. 63-4). The attorneys for AGECO, who were also officers and directors thereof, were told by Milvy of the payment of these moneys to defendant for his services (R. 18-19). No evidence was introduced to show that defendant was aware of any legal obstacle to his receipt of these moneys. Defendant's attorney inquired of defendant whether he ever had "any idea whatsoever that

you were under any duty to pay back any money to the corporation", but an objection to this question was sustained (R. 22).

Plaintiff is trustee in reorganization proceedings of the said company, the petition for reorganization having been filed on January 10, 1940 (R. 2). Plaintiff, an attorney, who is concededly an expert on legal subjects (R. 20), himself conceded that he did not believe that defendant was under any legal liability to him (R. 20). Defendant's attorney's inquiry of a predecessor trustee, Matthews, himself an attorney and one of the attorneys for plaintiff, as to whether he thought defendant was liable, was blocked by objection (R. 21). Defendant made his offer of proof that the said Matthews believed that defendant was under no duty to account to the corporation. *Ibid.*

No evidence was introduced to show concealment by defendant of receipt of the monies. Neither plaintiff nor any predecessor trustee of AGECO had any knowledge of receipt of monies by defendant nor could he have obtained such knowledge with due diligence prior to June 17, 1947 (R. 63-4), though the corporate predecessor had such knowledge (R. 18-19). This action was begun in July, 1948. No one ever asked defendant to pay back the money or even spoke to him about the matter prior to the demand served on him in June, 1948 (R. 22).

The District Court held that plaintiff had pleaded and proved a cause of action; that although defendant's conduct was not fraudulent and there was no concealment but merely silence, the two years federal bankruptcy statute of limitations* had not run in defendant's favor until this

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*"A * * * trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State Law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitations fixed by Federal or State Law had not expired at the time of the filing of the petition in bankruptcy." §11(e), Bankruptcy Act, 11 U.S.C. §29(e).

plaintiff or a predecessor trustee had knowledge or should have known of the facts; that interest should be awarded from the dates of receipt of the monies by defendant. The Court of Appeals for the Second Circuit on July 16, 1951 affirmed the decision below.

Jurisdiction

The jurisdiction of this Court is invoked under Section 1254 subd. 1 of the Judicial Code. The date of the judgment of the Court below to be reviewed is July 16, 1951.

Questions Presented

1. Whether the Court of Appeals for the Second Circuit erred in holding that the federal bankruptcy statute of limitations does not begin to run against a creditor until he learns or could reasonably learn of the debtor's liability to him, in the absence of fraud in fact or fraud in law, when the debtor has merely remained silent and has not committed any acts of concealment;

2. Whether the said Court erred in holding that the federal bankruptcy statute of limitations does not begin to run against a trustee in reorganization proceedings until he learns or could reasonably have learned of the debtor's liability, although the trustees' corporate predecessor knew all the facts of the transaction out of which the debt arose;

3. Whether the said Court erred in holding under the New York law that an accountant retained by an attorney in connection with certain actions for his professional services is a joint venturer with the attorney solely because he is to be paid on a contingency basis and is to be consulted in the event of settlement, though the accountant

had no control over the settlements and never worked on any case except upon the instructions of the attorney;

4. Whether the said Court erred in holding that under the New York law a person who renders services and receives funds representing the *res* of a constructive trust thereby becomes liable, though the person had no knowledge whatsoever of the existence of such a trust, and could not have had any such knowledge under the then state of the law;

5. Whether the said Court erred in holding that under the New York law a person is to be charged with interest from the date of receipt of the monies forming the *res* of a constructive trust though he has no knowledge of the existence of the constructive trust and though it was paid to him for services rendered and received without any knowledge that the creditor would ever assert any claim to it.

Reasons for Granting the Writ

1. The said Court of Appeals had decided a federal question in a way probably in conflict with applicable decisions of this Court, as well as in conflict with the decision of another Court of Appeals, in deciding that the two years federal bankruptcy statute of limitations [§ 11(e) Bankruptcy Act, 11 U.S.C. § 29(e)*] was tolled until plaintiff learned of defendant's receipt of the moneys, though no fraud or concealment of any sort was committed by defendant, who merely remained silent.

2. The said Court of Appeals has rendered a decision in conflict with an earlier decision of a different panel of the same Court, and in conflict with a later decision of another Circuit Court of Appeals on the same matter, in holding that the trustee plaintiff did not inherit his cause

* Quoted *supra* p. 3, footnote.

of action with the burdens of knowledge of the corporate predecessor, and so was barred by the statute of limitations.

3. The said Court of Appeals has decided several important questions of local law in a way probably in conflict with applicable local decisions, in deciding

a. That the trustee plaintiff was not charged with notice of defendant's receipt of the moneys which notice had been conveyed to the corporate predecessor, in probable conflict with two decisions of the New York Court of Appeals and a decision of an intermediate appellate court in New York;

b. That defendant was liable as a joint venturer under circumstances which the New York Court of Appeals has held not to be a joint venture;

c. That defendant who received money without notice of a constructive trust and for consideration was liable, in probable conflict with several decisions of lower New York courts;

d. That interest was properly awarded from the date of receipt of the moneys by defendant, in probable conflict with the decision of an intermediate appellate court of New York.

4. If for no other reason, this Court should review the decision below on the first-mentioned ground because of the tremendous implications of a decision holding that in cases not involving fraud, every federal statute of limitations is tolled until plaintiff learns of his right to sue, though defendant merely remains silent, thus utilizing an exception whose reason is to prevent fraud in cases where, there being no fraud, the reason ceases to exist.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of ~~and~~ this Court directed to the Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court for its review a full and complete transcript of the record and of all proceedings of the said Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Court below be reversed, and that the petitioner be granted such other and further relief as may seem proper.

Dated: New York, N. Y.
October 5, 1951

SAMUEL M. LEVY,
By HERBERT MONTE LEVY
Attorney for Petitioner.

IN THE

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No.

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against

LEWIS M. DABNEY, JR., as Trustee of Associated Gas and Electric Company, Debtor, etc.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Court of Appeals is not yet reported. It appears at pages 87-93 of the record. The first opinion of the District Court is reported at 92 F. Supp. 512, and appears at pages 52-57 of the record; its opinion on rehearing (not yet reported) appears at pages 58-62 of the record.

Jurisdiction

The jurisdiction of this Court is invoked under Section 1254 subd. 1 of the Judicial Code. The date of the judgment of the Court below to be reviewed is July 16, 1951.

Statement of the Case

A statement of the case appears in the foregoing petition for the writ, and for the sake of brevity is here omitted.

ARGUMENT

POINT I

The decision of the Court of Appeals that the federal bankruptcy statute of limitations did not begin to run until plaintiff learned of defendant's receipt of the monies even in the absence of fraud and concealment is in probable conflict with a decision of this Court as well as in conflict with a decision of another Court of Appeals.

The Court below held that the situation in *Bailey* v. *Glover,* 21 Wall. 343 (1874), in which the statute did not run against plaintiff until he learned all facts, was precisely like that in this case, that the action there was by an assignee or trustee in bankruptcy, that in both cases each was to recover money which belonged to the bankrupt and which the defendant had converted, that in each the defendant had done nothing to cover up his guilt, and that in each there was no deceit. What the Court below did was to confuse plenary suits by a trustee on behalf of a corporation for breach of contract—the case at bar—with proceedings to set aside a concealed fraudulent conveyance, as in *Bailey.*

In the *Bailey* case, there was actual fraud and deception, as well as concealment. There had been a fraudulent misrepresentation that the transfer of property was a valid transfer, by which misrepresentation the defendant had been able to obtain a discharge. The case arose on demurrer to a bill in equity, by which defendant there admitted the fraud and concealment alleged in the bill. As the Court there stated, "* * * the bill contains a distinct allegation that the defendants kept secret and

concealed from the parties interested the fraud which is sought to be redressed * * * *Id.* at 348-9.

Nor is there any relevancy in the fact that the action in both cases is by an assignee or trustee in bankruptcy. Defendant's misrepresentation in *Bailey* was to the trustee; defendant here had no transactions with the trustee. Plaintiff's cause of action, if any, arose before the reorganization proceedings began, and defendant's misconduct, if any, was only against the corporation whose cause of action the trustee inherited. Nor is there any similarity between the case of an assignee in bankruptcy suing to set aside a fraudulent conveyance and a reorganization trustee suing to collect a claim of its corporate predecessor.

The gravamen of the action in *Bailey* was the defendant's action in making a conveyance deemed fraudulent in law as well as in fact. Defendant in the case at bar was not being sued for any conveyance, but rather for the receipt of monies; defendant in the case at bar did nothing which is or which a statute makes fraudulent.*

Thus, the only similarities between this case and *Bailey* v. *Glover* are that the defendant had acted wrongfully and that the assignee or trustee had failed, but not through lack of diligence, to discover the transfer within the period of limitation. In such cases, the statute does run against the plaintiff.

The opinion in *Bailey* v. *Glover* rests on the philosophy that statutes of limitations being "enacted to prevent frauds", permitting the statute to run while concealed

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* While it may be true that participation in settlement of a stockholder's suit knowing that it is settled with the moneys of the corporation may be the equivalent of fraud (*Erie Railway Co.* v. *Vanderbilt*, 5 Hun 123 (Gen. T., 1st Dept., 1875), defendant here did not participate in the settlement. Milvy, who did the settling, made inquiries to make sure the directors were paying their own money; he was assured that they were, and the case was settled (R. 18).

fraud remained undiscovered "is to make the law which was designed to prevent fraud the means by which it is made successful and secure." *Id.* at 349. But the reason for this rule—the prevention of fraud—ceases when, as here, there is neither fraud nor concealment. In such a case, the statute of limitations, whose very purpose it is to prevent fraud, must be strictly applied. This was the holding of this Court in *Avery* v. *Cleary,* 132 U. S. 604 (1890), which was, as in *Bailey,* an action brought by an assignee in bankruptcy.

Avery v. *Cleary* was an action by the assignee in bankruptcy of one Ellis against the administrator of Ellis' estate. Before filing his petition in bankruptcy, Ellis had assigned certain insurance policies in trust for his daughter to one Morse. But the bankruptcy schedules made no mention of the policies. And when Ellis died, the insurance company paid the proceeds of the policy to Ellis' administrator.

Plaintiff's declaration alleged that the policies had passed to the assignee, that their existence had been concealed and withheld, that they were in defendant's possession, and that the assignee had no knowledge or information concerning the policies until shortly before bringing the suit. The answer put the material allegations of the complaint at issue, and pleaded that the action did not accrue within two years before the suing out of plaintiff's writ. The lower court rendered judgment for the plaintiff.

The trial court had been requested to charge the jury that the action was barred by the then two years bankruptcy statute of limitations, unless the defendant had fraudulently concealed the alleged cause of action, and that mere omission to report to plaintiff did not amount to fraudulent concealment; and that mere ignorance would not take the case out of the statute of limitations. This

request to charge was denied. The Supreme Court reversed the judgment, holding that these instructions should have been given. Said the Court:

> "It is * * * barred by limitation, unless it can be brought within the rule announced in *Bailey* v. *Glover* * * *." *Id.* at 609.
>
> "The ground upon which the plaintiff claims exemption from the limitation of two years is that the schedules in bankruptcy omitted all mention of the policies in question, and that the fact that the policies existed was 'concealed and withheld' by the bankrupt in his lifetime, and, since his death, by his administrator.
>
> "If it be assumed that Ellis had not, prior to his bankruptcy, delivered the assignment * * *, and that his interests and rights in these policies were transferable to his assignee, *the mere fact that he omitted any mention of the policies in his schedules in bankruptcy, and that neither he nor his administrator gave information of them to the assignee, would not establish fraud within the meaning of the rule announced in Bailey* v. *Glover.* The omission from the schedules of any reference to the policies, and the failure to call the attention of the assignee to them, may have been caused by an honest belief, upon the part of Ellis, that they belonged to his children, or were not such property as the law required to be surrendered to the assignee * * *. Fraud is not imputable to (the children), nor to the guardian, simply because neither they nor he informed the assignee in bankruptcy of their claims. *Their silence, when they were not under any legal obligation to speak, and when they were unaware of any claim being asserted by the assignee, did not amount to concealment.* They did nothing to prevent him from obtaining full information in reference to the assets of the bankrupt. The record discloses no circumstances tending to prove that they

sought to keep their claim from the knowledge of the assignee." *Id.* at 610-611. (Emphasis supplied.)

That the case at bar is an *a fortiori* case is demonstrated by the following comparison:

	Avery v. *Cleary*	*Dabney* v. *Levy*
1.	Defendant omitted any mention of the policies in his schedules.	Defendant made no mention of the receipt of money; he was never under any duty to furnish any schedules whatsoever.
2.	The omission may have been caused by an honest mistake of law.	The receipt of the moneys and the omission were caused by an honest mistake of law. Defendant in addition offered such proof (22); plaintiff, indeed—admittedly a legal expert—testified he believed defendant was not liable to plaintiff (20).
3.	Silence does not amount to fraudulent concealment when there is no duty to speak and defendant is unaware of any claim being asserted.	Silence does not amount to fraudulent concealment when there is no duty to speak and defendant is unaware of any claim being asserted.

The *Avery* case went on to state in dictum (for the only issue before the Court was whether the requested charges on silence not being equivalent to fraudulent concealment should have been given) that plaintiff could have with due diligence ascertained the facts. But this was entirely apart from the question with which we are concerned. As this Court stated, "A critical examination of the evidence leaves no room to doubt that, *apart from any question as to concealment upon the part of the bankrupt or*

his administrator, the assignee did not show such diligence as entitles him to exemption from the limitation * * *." (Emphasis added), 132 U. S. 604, 611-12. This Court went on to state *obiter* that the Court below would not have erred had it given a peremptory instruction to find for the defendant upon the issue in this regard.

The Court below attempted to distinguish *Avery* v. *Cleary* on the grounds that "if Levy was 'unaware' of any legal obligation, he was incapable of all moral sensibility * * *". But there was not one scintilla of evidence in the record to show that he Levy was aware of any legal obligation. Had Levy consulted the judges of the Appellate Division of the Supreme Court, First Department, New York's intermediate appellate court, in 1946, they would have unanimously told him that he was under no duty to pay back the monies to the corporation, for in *Clarke* v. *Greenberg,* 270 App. Div. 923, they unanimously ruled that even a stockholder who recovers proceeds in a derivative action is not required to account to the corporation. Had he consulted the plaintiff, a legal expert, he too would have told him—as he stated on the trial—that he was not under a legal liability (R. 20). And indeed had he consulted the attorneys for the plaintiff, they too would have told him that he was under no legal liability (R. 21). *Clarke* v. *Greenberg,* even when decided by the New York Court of Appeals, 296 N. Y. 146 (1947), merely held, in reversing the Appellate Division, that a shareholder bringing a shareholder's action must account to the corporation for the proceeds of the action. This was indeed the first judicial utterance anywhere to contradict the Appellate Division's finding of nonliability in such cases. *Note,* 37 Minn. L. Rev. 180, 182. It is common knowledge that the entire Bar believed, prior to the N. Y. Court of Appeals decision, that the shareholder and his

attorneys could legally retain the settlement proceeds. The Court below in the case at bar in addition created a completely new judicial doctrine, (which defendant could hardly have been aware of before 1951) when it held liable the accountant paid for his services by the shareholder's attorney. This Court's comment in *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939) is entirely apposite:

> "It would be hard to hold that, in advance of judicial utterance upon the subject, they were bound to understand the challenged law according to the language later used by the court." *Id.* at 456.

Surely a layman cannot be charged in fact with knowledge of liability if New York's intermediate appellate court, plaintiff's attorney, and plaintiff himself would tell him he had none, especially since there was no evidence whatsoever that Levy was aware of any legal obligation. Levy was no more "incapable of all moral sensibility" than are plaintiff, his attorneys, and the five justices of the Appellate Division of the New York Supreme Court.

Defendant has never contended that *Avery* v. *Cleary* overruled *Bailey* v. *Glover.* Defendant merely contends that *Avery* v. *Cleary* shows conclusively that in cases not involving fraud, as in the case at bar, the statute begins to run in spite of the silence of the defendant where there is no concealment.

The decision of the Court below is, moreover, in conflict with a decision of the Court of Appeals for the Fifth Circuit, which held in *Arkansas Natural Gas Co.* v. *Sartor,* 78 F. 2d 924, cert. den., 296 U. S. 656, that concealment by defendant only by silence is not enough to toll the statute of limitations. As the Court there stated at page 929:

> "Statutes of limitation are founded on public policy and are favored in the law. Mere ignorance of

one's rights will not toll the statute of limitations. *Concealment by defendant only by silence is not enough.* He must be guilty of some trick or contrivance tending to exclude suspicion and prevent inquiry. * * * *We know of no decision, either of controlling authority or persuasive, holding that mere ignorance on the part of the creditor will toll the statute.*" (Emphasis supplied.)

POINT II

The panel of the Court of Appeals below, in holding that the trustee plaintiff did not inherit his cause of action with the burdens of knowledge of the corporate predecessor, rendered a decision in conflict with an earlier decision of a different panel of the same court, and in conflict with a later decision of another Court of Appeals for a different circuit.

If knowledge of receipt of the moneys by defendant is attributed to plaintiff, clearly there is no such ignorance of the facts as to suspend the running of the statute even were this a case of fraud. That such knowledge must be attributed to plaintiff is apparent from the fact that receipt of the money by defendant was known to the attorneys for the corporation, who were also directors and officers thereof. A different panel of the same Court of Appeals imputed such knowledge to the corporation in *Laird* v. *United Shipyards,* 163 F. (2d) 12 (1947) (a case in which this Court denied certiorari, 332 U. S. 842 (1947)), a case where those derelict in their duty were in control of the corporation, and the same Court has imputed notice to a receiver upon his appointment. *Michelsen* v. *Penney,* 135 F. (2d) 409 (1943). Such knowledge would thus be imputable to plaintiff here in 1940, the time when the first

trustee was appointed, and plaintiff is thus barred from suit brought here in 1948.

And only last August 14, 1951, the Court of Appeals for the Third Circuit held that a trustee in bankruptcy takes his causes of action burdened with all the liabilities of his predecessor. Said the Court:

> "When the trustees began to perform the contract, they elected to stand in the Debtor's shoes. Upon completion of the contract the trustees had the right to receive $75,000 less $10,000 because they took the Debtor's property 'with all the liabilities attached', encumbered by all the Debtor's acts and subject to all the equities to which it was liable." *In re Italian Cook Oil Corp.,* No. 10,334, p. 5 (slipsheet opinion, not yet officially reported).

When the trustee here elected to stand in the shoes of the Debtor by suing on the alleged implied contract that had been made with it by defendant, he too is encumbered by the Debtor's knowledge and subject to this defense. If the "contract" on which plaintiff sues is indeed to be "implied instanter", as the Court below held (R. 93), then surely the knowledge that the corporation had at that moment must also be attributed to it "instanter" as well as to its successor, the present plaintiff.

POINT III

The Court of Appeals decided an important question of local law in a way probably in conflict with applicable local decisions, in deciding that the trustee plaintiff was not charged with the notice of defendant's receipt of the moneys had by plaintiff's corporate predecessor.

The New York Court of Appeals, New York's highest court, has twice ruled, in cases in which the plaintiff was a successor trustee, that the statute of limitations is not tolled when the corporate predecessor had knowledge, even where the only individuals having such knowledge were the guilty ones in control of the corporation. *Hastings* v. *Byllesby & Co.* (*Haystone*), 293 N. Y. 404 (1944) (relied upon by the other panel of the Court below in *Laird* v. *United Shipyards, supra*); *American Cities Power & Light Corp.* v. *Williams,* 74 N.Y.S. 2d 369 (Sup. Ct. 1947), unan. affd., 80 N.Y.S. 2d 357 (1st Dept., 1948), leave to appeal denied, 298 N. Y. 931 (1941). See also *Turner* v. *American Metals Co.*, 36 N.Y.S. 2d 356, 381 (Sup. Ct. N. Y. Co. 1942), rev'd on other grounds, 268 App. Div. 239 (1st Dept., 1948), app. dismissed, 295 N. Y. 822 (1946).

The law in New York is also clearly spelled out in Section 48(5) of the New York Civil Practice Act, which reads as follows:

> "The following actions must be commenced within six years after the cause of action accrued:
>
> • • •
>
> (5) An action to procure a judgment on the ground of fraud. *The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.*" (Emphasis supplied.)

Thus, were this to be considered a fraud case, the action in New York would be deemed to have accrued upon the discovery by the corporate predecessor of plaintiff—the person "under whom" plaintiff "claims"—of the facts, which discovery took place in 1938. Clearly plaintiff is barred from suit here.

POINT IV

The decision below that defendant was a joint venturer with plaintiff is in probable conflict with an applicable decision of the New York Court of Appeals.

The Court below rejected the defense that Levy was not charged with notice of Milvy's constructive trust and that he held the moneys received as a bona fide purchaser based on the work he did for Milvy, because the agreement between them made the prosecution of the suit a joint venture between them. In finding such a joint venture, the Court relied on the provisions in the agreements (1) that Milvy was to consult Levy in event of settlement, (2) that Levy was to be paid on a contingency basis out of the proceeds. But this holding of the Court was in probable conflict with the decision of the New York Court of Appeals in *In re Grapel* v. *Hodges,* 112 N. Y. 419 (1889), in which it was held that a venture was not joint even though the employee was to be paid on a contingency basis out of the proceeds. True, there was nothing in the agreement construed in *Grapel* about consultation—there could not be for there the employee had the untrammeled greater right to make settlement himself —but there is nothing in the record of this case to show that consultation by Milvy of Levy was for any other purpose than securing his professional advice as an em-

ployed accountant. Defendant had no control over settlements, and never worked on a case until Milvy asked him to (R. 16-17, 22). The consultation provision can hardly turn a contract for services rendered into a joint venture, since assuredly the right of an employer to consult an expert employee is implicit in every agreement of employment.

POINT V

The decision below that defendant was liable though he received money without notice of a constructive trust and for consideration was in probable conflict with several decisions of New York courts.

A. Mere receipt of moneys forming the subject of a constructive trust does not render one liable, unless he has notice that the fiduciary from whom the funds were received was violating his trust. As the highest New York Court to speak on this subject said, in discussing the right of a plaintiff to recover from the transferee moneys allegedly diverted from trust purposes,

> "That can only be done if the recipients took these payments with notice or knowledge that these were trust funds, and that such funds had been improperly diverted. *Mere knowledge as to the source of the moneys is not sufficient—there must also be knowledge of the violation of a trust duty.*" (Emphasis supplied.) *Bonham* v. *Coe,* 249 App. Div. 428, 433 (4th Dept., 1937), affd., 276 N. Y. 540.

No evidence was ever introduced to show that defendant ever had such knowledge (see *supra,* pp. 15-16). No such evidence could have been introduced, for it was not until 1947—when the statute of limitations had already run—

that the New York Court of Appeals reversed *Clarke* v. *Greenberg*. It was then that lawyers no less than laymen were advised for the first time that funds received under such circumstances should be returned.

B. Even if defendant had such knowledge, he would not be liable under the New York cases since he received the funds in the ordinary course of business, either for a new consideration or for an existing debt [*Justh et al.* v. *Nat. Bk. of the Commonwealth*, 56 N. Y. 478 (1874); *Newhall* v. *Wyatt*, 139 N. Y. 452 (1893)], even when it is to his knowledge trust funds for the services he rendered [*Skinnell* v. *Mahoney*, 197 App. Div. 808 (2d Dept., 1921)].

C. The Court below in effect distinguished these cases on the ground that defendant was a joint venturer with Milvy, the fiduciary. However, such a holding is in probable conflict with another decision of the N. Y. Court of Appeals (see POINT IV, *supra*, pp. 20-21).

POINT VI

The decision below that interest should be awarded from the date of receipt of the moneys by defendant is in probable conflict with the decisions of two intermediate appellate courts of New York.

In each of the cases cited by the Court below for its affirmance of an award of interest of about 75% of the amount of the judgment, there was fraud. No New York Court has ever awarded interest from the date of receipt of the moneys by a defendant in a case such as this not involving fraud.

Even were payment to defendant made under duress and involuntary, interest would run only from the date of demand, not from the date of payment. *Amer. Dist. Tel.*

Co. v. *N. Y.*, 213 App. Div. 578 (1st Dept., 1925). If plaintiff there was not entitled to interest from the date of payment of the funds in question when payment was involuntary, certainly plaintiff here is not entitled to interest from such date when payment was voluntary, when interest at most would begin to run only from the date the action was begun.

But under the circumstances of this case, defendant is not liable for any interest whatsoever. The following portion of the opinion in *Evans* v. *Garlock*, 37 Hun 588 (5th Dept., 1888), where the question was whether defendant was entitled to interest on her claim against plaintiff, enunciates the rule and its rationale:

> "It (interest) is allowed where the circumstances are such as to show that as between the parties the one recovering is equitably entitled to it; and as a rule it will be charged to a trustee who has used the trust fund, been negligent in paying it over or investing it. * * * The plaintiff was not conventionally a trustee. *The money came to him under circumstances which enabled him to understand that it was his and paid to him on a debt justly due.* And it is not apparent why he should be charged with interest on the money until he was in some manner in default. * * * *he had no knowledge* * * * *that she (defendant)* * * * *would assert any claim to it.* The case does not seem to come within any principle which should charge the plaintiff with interest." *Id.* at 592-3.

Note how applicable are those words to this case! Here, too, the money came to the person sought to be charged with interest under circumstances which he understood to be payment to him on a debt justly due; here too he had no knowledge that his opponent-to-be would ever assert any claim to it. Thus, it is clear that under this case the plaintiff has no right to interest *at all.*

It is true that Section 480 of the New York Civil Practice Act, quoted below,* giving plaintiff a right to interest in actions involving breach of contract, was passed after *Evans* and *American District* were decided. But this section does not presume to state when interest begins to run, so that it must be presumed to have approved or at least not have overturned the doctrine of these cases. Certainly a statutory intention to overrule these cases cannot be implied from the wording of this statute.

If the theory of recovery of the Court below is that this is an action for breach of contract, its argument that the statute of limitations did not begin to run against plaintiff until he learned of receipt of the moneys by defendant is invalid. This is not a fraud action in one breath and a contract action in another. It is, in fact, neither; it is rather an action in quasi-contract for money had and received. Plaintiff cannot therefore recover interest from the dates of such receipt.

CONCLUSION

The petition for a writ should be granted.

Dated: New York, N. Y.,
October 5, 1951.

Respectfully submitted,

HERBERT MONTE LEVY,
Attorney for Petitioner,
Samuel M. Levy.

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* "In every action wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, interest shall be recovered upon the principal sum * * *."

Office Supreme Court, U.S.
FILED
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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 377

SAMUEL M. LEVY,

Petitioner,

vs.

LEWIS M. DABNEY, JR., as Trustee of Associated Gas and Electric Company, Debtor, in a Proceeding for Corporate Reorganization under Chapter X of the Bankruptcy Act,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

HAROLD HARPER,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 377

SAMUEL M. LEVY,

Petitioner,

vs.

LEWIS M. DABNEY, JR., as Trustee of Associated Gas and Electric Company, Debtor, in a Proceeding for Corporate Reorganization under Chapter X of the Bankruptcy Act,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below.

The opinion of the Court of Appeals is reported at 191 F. 2d 201. The first opinion of the District Court is reported at 92 F. Supp. 551; its opinion on rehearing (not reported) appears at pages 58-62 of the record.

Jurisdiction.

Petitioner has invoked the jurisdiction of this Court under § 1254, subdivision 1 of the Judicial Code.

Statement of the Case.

Petitioner seeks to review a judgment of the Court of Appeals for the Second Circuit rendered August 13, 1951, which affirmed a judgment of the District Court rendered December 8, 1950 in the total amount, with interest and costs, of $10,434.74. A jury had rendered a general verdict for $6,000, and had also answered interrogatories [63-4]* as follows:

> "First Interrogatory: Did defendant receive money from Milton I. Milvy with knowledge that such money was being paid to him as part of the proceeds of the settlement of the stockholder's derivative action in the New York Supreme Court entitled Russell, et al v. Hopson, et al?
>
> "Answer: Yes.
>
> "Second Interrogatory: If so, how much did defendant receive?
>
> "Answer: $6,000.
>
> "Third Interrogatory: State when such sum or sums were so received by defendant.
>
> "Answer:
>
> | | |
> |---|---|
> | August 18, 1938 ..... | $ 500.00 |
> | September 13, 1938 ..... | 1,000.00 |
> | October 18, 1938 ..... | 3,000.00 |
> | November 9, 1938 ..... | 1,500.00 |
>
> "Fourth Interrogatory: Did plaintiff or a predecessor trustee of Associated Gas and Electric Company have knowledge, prior to June 17, 1947, of such receipt of moneys by defendant?
>
> "Answer: No.
>
> "Fifth Interrogatory: Could plaintiff or any predecessor trustee of Associated Gas and Electric Company with due diligence have obtained such knowledge prior to June 17, 1947?
>
> "Answer: No."

Defendant Samuel M. Levy, an accountant, and Milton I. Milvy, a lawyer, were brothers, the latter having changed

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* References unless otherwise specified are to pages of the record.

his name [68]. On April 27, 1936 [47-8], they entered into a joint venture for the prosecution of stockholders' derivative actions on behalf of eleven large corporations, Milvy to do the legal work and defendant the accounting. The gross fees were to be divided, one-third to defendant and two-thirds to Milvy. On July 7, 1938, in a suit brought on behalf of two stockholders of Associated Gas and Electric Company (Ageco) in a New York State Court, they succeeded in effecting a private settlement with the defendants in that action and Milvy received $21,000 [4, 5, 8], surrendering stock worth $204.88. Actually, the money came from a wholly owned subsidiary of Ageco [13]. Milvy paid his own disbursements [2-3], gave less than $1,000 to the stockholder clients [5, 7], and retained the balance for defendant and himself.

Although there was evidence that Milvy was suspicious that the settlement money might be coming from the corporation itself and not from the defendant-directors [17-18], there was no proof that either he or defendant knew the actual source. The jury found, however, that when defendant received $6,000 he knew that that amount came from the proceeds of settlement of the action ostensibly brought on behalf of the corporation [63]. In view of defendant's arrangement with Milvy, he must have known that the corporation was receiving nothing.

A petition for the reorganization of Ageco was filed January 10, 1940 [2]. Plaintiff is successor trustee. The jury has found that neither plaintiff nor his predecessors had knowledge prior to June 17, 1947, of defendant's receipt of a part of the proceeds of the private settlement. It has further found that neither plaintiff nor any predecessor trustee could with due diligence have obtained such knowledge prior to that date [63-4]. Suit was commenced June 28, 1948 [1].

POINT I.

The decision that recovery was not barred by a statute of limitations is not in conflict with a decision of this Court.

A. Under the rule of *Bailey* v. *Glover*, the action was commenced in time.

§ 11 of the Bankruptcy Act (11 U. S. C., § 29), so far as material, reads as follows:

> "e. A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the federal or state law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by federal or state law had not expired at the time of the filing of the petition in bankruptcy."

The "adjudication" in the case of a Chapter X proceeding is the date of the approval of the petition (Bankruptcy Act, § 102, 11 U. S. C., § 502). The petition for the reorganization of Ageco was filed and approved January 10, 1940 [2, 8].

Defendant received his share of the proceeds of the private settlement, in which his joint venture with Milvy had resulted, in several payments, the first of which was on August 18, 1938, and the last on November 9, 1938 [63].

The New York Court of Appeals has held an action of this character to be one for money had and received. *Clarke* v. *Mayer* (1946) 295 N. Y. 830. Such a claim, sounding in contract, is not barred under state law until six years after its accrual. New York Civil Practice Act, § 48, subdivision 1. The period of limitation fixed by state law thus not having expired at the time of the filing of the petition in bankruptcy on January 10, 1940, the federal statute came into play.

The running of the federal statute, however, was under federal law suspended by the rule of *Bailey* v. *Glover* (1874) 21 Wall. 342, in the contemplation of which it was enacted and by which it must be construed. That rule is that where there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him, and that that is so although the party committing the fraud has made no special effort to conceal it.

The jury found that neither plaintiff nor his predecessors had knowledge prior to June 17, 1947, of defendant's receipt of his share of the proceeds of the private settlement and could not with due diligence have obtained such knowledge prior to that date [63-4].

If, therefore, the rule of *Bailey* v. *Glover* is applicable, the two-year federal statute did not commence to run until June 17, 1947, and the claim was not barred when, on June 28, 1948, the complaint was filed [1].

Bailey v. *Glover* was, as here, a suit by an assignee in bankruptcy, and the statute of limitations in question was the two-year statute, the predecessor in the Bankruptcy Act of 1867 of the present statute of limitations.

The suit was in equity to set aside as fraudulent a transfer by the bankrupt. It was held error to dismiss the bill upon the ground that the statutory period had expired. The Court said, per MILLER, J. (p. 348):

> "We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered,

> though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

The Court then pointed out that under the 1867 statute "no suit at law or in equity" could be brought after the expiration of the statutory period, and said (p. 349):

> "It is quite clear that this statute must be held to apply equally by its own force to courts of equity and to courts of law, and if there be an exception to the universality of its language it must be one which applies under the same state of facts to suits at law as well as to suits in equity.
>
> "But we are of opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity."

Fraud, of course, is a word capable of very broad meaning. As stated in *Connolly* v. *Gishwiller* (7 C. A. 1947) 162 F. 2d 428, cert. denied 332 U. S. 825 (p. 433):

> "Fraud, in its general sense, comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust or confidence and resulting in damage to another."

"Fraud", as used in *Bailey* v. *Glover,* is obviously used in a broad and generic sense and not in the narrower sense of deceit. *Bailey* v. *Glover* was a case of a fraudulent transfer by a bankrupt. In order for it to be a "fraudulent conveyance" it is not necessary that the bankrupt conceal from his creditors what he is doing.

Bailey v. *Glover* exactly fits the present case. As the Court of Appeals noted in the instant case [91]:

> "Each action was by an assignee, or trustee, in bankruptcy; each was assumed to be barred under the state law; each was to recover money which had belonged to the bankrupt and which the defendant

had converted; in each the defendant had done nothing to cover up his guilt; in each the assignee, or trustee, had failed to discover the transfer within the period of limitation; and in each there had been no lack of diligence on his part in failing to do so."

The point which petitioner makes (Brief, p. 11) that what was transferred in the *Bailey* case was real estate while here it is money, is manifestly a distinction without a difference.

The Court below, therefore, did nothing but follow a close and controlling precedent.

B. *Bailey* v. *Glover* was not overruled or modified by *Avery* v. *Cleary*.

Petitioner's contention that the decision below is in conflict with a decision of this Court is apparently based upon the theory that *Bailey* v. *Glover* was modified by *Avery* v. *Cleary* (1890) 132 U. S. 604. Under the doctrine of that case, he argues, the running of the statute is not suspended if there be no efforts on the part of defendant to conceal the cause of action from the knowledge of the other party.

Avery v. *Cleary* was also a suit by a bankruptcy assignee to set aside a fraudulent transfer. But it cannot be made to stand for petitioner's proposition. In the first place, the assignee's predecessor in that case had had knowledge of the existence of the transfer for an entire two-year period and had done nothing about it. That in itself was sufficient for the decision of the case. In the second place, the Court's language upon which petitioner leans was not spoken of a participant in the fraud, but of minor children, who knew only that they had received the proceeds of their father's (the bankrupt's) life insurance policies.

Moreover, subsequent decisions of this Court have made it clear that *Bailey* v. *Glover* remains unimpaired and is

still the law. In *Exploration Co.* v. *United States* (1918) 247 U. S. 435, this Court said, per DAY, J. (p. 448):

> "*Bailey* v. *Glover* has never been overruled nor modified in this court and has been approved and followed."

The Court cited several decisions in support of that statement and among them, *Avery* v. *Cleary.*

This Court as recently as 1946, in *Holmberg* v. *Armbrecht,* 327 U. S. 392, again attested the allegiance of this Court to the *Bailey* doctrine, saying, per FRANKFURTER, J. (p. 397):

> "And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.' *Bailey* v. *Glover,* 21 Wall. 342, 348; and see *Exploration Co.* v. *United States,* 247 U. S. 435; *Sherwood* v. *Sutton,* 5 Mason 143.
>
> "This equitable doctrine is read into every federal statute of limitation."

In view of this recent approval of the *Bailey* doctrine, not partially but in its entirety, the contention that *Avery* v. *Cleary* has established a different doctrine and that the Court below did wrong to follow *Bailey* v. *Glover* is clearly not well taken.

C. Since *Bailey* v. *Glover* has not been overruled or modified, the question whether it was correctly applied to the particular facts is not one for certiorari.

At one point (Brief, p. 16) petitioner disavows the contention that *Avery* v. *Cleary* overruled *Bailey* v. *Glover.*

If this concession be accepted, the only question presented by the petition is whether the Court correctly applied *Bailey* v. *Glover;* i.e., whether under the particular facts of this case petitioner is to be classified as a participant in a fraudulent transaction, or as an innocent of like status with the minor children in *Avery* v. *Cleary.*

But petitioner's contention that he was not in fact guilty of fraud clearly does not present a question for determination by this Court. The courts below had ample support for their view.

The proceeds of the settlement of the stockholder derivative action, whether they come from the corporate till or from the individual defendants, belong to the corporation. The stockholder plaintiff is a fiduciary for moneys received in settlement of the action. *Clarke* v. *Greenberg* (1947) 296 N. Y. 146; *Certain-Teed Products Corporation* v. *Topping* (2 C. A. 1948) 171 F. 2d 241.

Petitioner's entire brief proceeds on the erroneous assumption that participation in a breach of fiduciary duty is not fraud in the broader sense in which that word is used in *Bailey* v. *Glover.* In New York, it is the law that the breach of a fiduciary duty is fraud. *Emmerich* v. *City Bank Farmers Trust Co.* (1950) 300 N. Y. 417.

Petitioner relies heavily on the proposition that, prior to the decision of the Court of Appeals in *Clarke* v. *Greenberg* (1947) 296 N. Y. 146, a segment of the bar, and even certain of the inferior courts in New York, appeared to be of opinion that if a stockholder derivative action was settled before judgment, the stockholder, his lawyer and accountant might appropriate the proceeds and give nothing to the corporation whose rights they had purported to champion. This proposition was so monstrous, however, that it was bound to meet authoritative judicial condemnation. The decision of the New York Court of Appeals in *Clarke* v. *Greenberg* had been foreshadowed by the decision of this Court in *Young* v. *Higbee Co.* (1944) 324 U. S. 204.

The private settlement in this case, while typical, exhibits in its detail the essentially fraudulent character of the transaction. Milvy knew that other suits had been brought [69, 70]. There was no need for this one. The complaint was not the result of additional research, either on the part of Milvy or of defendant. Milvy simply copied the complaint in a previous action [70, 74]. Defendant's "services" (which, incidentally, he denied having rendered) consisted, not in analyzing corporate records or statements, but in analyzing the complaints in previous stockholder actions [70]. The very day the suit was started Milvy and defendant entered into a new agreement for division of the spoils [82]. Practically simultaneously with the commencement of the suit Milvy was in settlement negotiations [72]. Those negotiations were with the attorneys for the corporation whose interest the co-adventurers had purported to champion [70, 72]. The settlement took the form of the sale for $21,000 of Ageco stock worth $204.88. The stockholders who had loaned their names to the enterprise received relatively insignificant portions of the settlement money; the balance, less Milvy's disbursements, was divided between Milvy and Levy in accordance with the terms of their agreement.

The corporation, which was to be benefited, actually suffered to the extent of the settlement moneys paid its professed champions. Whether Milvy and defendant knew the actual source or not, the manner of the prosecution and settlement of this suit was clearly such as to indicate that the parties at no time had an intention of actually securing redress for the wrongs which the corporation had suffered.

What the co-adventurers sought and received was hush money. Implicit in the settlement, if not expressed, was the agreement to keep quiet about the wrongs which the corporation had suffered and which had been the subject

of their complaint. There would be no point in paying so excessive a price for the stock unless that were understood.

Hence this situation fits exactly into the ruling of *Bailey* v. *Glover,* which halts the running of the statute until discovery "when the fraud has been concealed, or is of such character as to conceal itself." Indeed, the private settlement of the stockholder action precisely fits the description of a fraud "of such character as to conceal itself." It was because these settlements were of such character as to conceal themselves that Federal Rule of Civil Procedure 23 required notice to stockholders and approval of the Court as a condition precedent to a dismissal or compromise of the action.

POINT II.

No conflict exists between decisions of the Courts of Appeal either within or without the Second Circuit upon the question of the suspension of a federal statute of limitations by concealment of the fraud.

No decision of a court of appeals has departed from, or attempted to place any refinement upon the doctrine of *Bailey* v. *Glover.* None of the cases cited by petitioner related to a federal statute of limitations.

Arkansas Natural Gas Co. v. *Sartor* (5 C. A. 1935) 78 F. 2d 924, dealt solely with the application of a Louisiana statute of limitations. This decision upon purely state law presents no conflict with the decision below. Furthermore, the Court in that case held that plaintiffs with reasonable diligence could have ascertained their rights.

Michelsen v. *Penney* (2 C. A. 1943) 135 F. 2d 409, 415, dealt exclusively with the New York statute of limitations. The Court pointed out that in New York the rule that the cause accrues only upon discovery of the facts is not ordinarily applied. The Court said, per CLARK, *J.* (p. 415):

"But the statute is tolled while a corporate plaintiff continues under the domination of the wrongdoers."

It is true that knowledge of the transactions there reviewed was imputed to the national bank receiver from the date of his appointment. The case, however, did not involve fraud, and all of the transactions which were held unlawful, or as to which the bank directors were held negligent, were ascertainable from the books and records of the bank in the receiver's possession.

Laird v. *United Shipyards, Inc.* (2 C. A. 1947) 163 F. 2d 12, also dealt exclusively with the New York statute. The Court said in that case (p. 15):

> "It has been proved and found that at the time such alleged breaches of duty occurred all parties then having any interest in, or holding any position of responsibility to, the corporation were fully aware of all the facts."

There was no such proof in this case.

In re Italian Cook Oil Corporation (3 C. A. 1951) 190 F. 2d 994, holds that a reorganization trustee who elects to complete a contract is bound by an assignment of the moneys to become due under the contract which the debtor made before the petition was filed. It is not a statute of limitations case, and there was no claim of fraud.

POINT III.

This Court will not review the determination of the Court of Appeals that interest was properly added, since that is exclusively a question of state law.

"The question [of interest] is always one of local law." *Holden* v. *Trust Company* (1879) 100 U. S. 72, 74.

This is true when the case is one of diversity of citizenship. *Ohio* v. *Frank* (1880) 103 U. S. 697; *Massachusetts*

Benefit Association v. *Miles* (1891) 137 U. S. 689, 691; *Klaxon Co.* v. *Stentor Co.* (1941) 313 U. S. 487, 497. It is also true when the case is one arising under the Constitution and laws. *Louisiana & Arkansas Ry. Co.* v. *Pratt* (5 C. A. 1944) 142 F. 2d 847; *Rigopoulos* v. *Kervan* (S. D. N. Y. 1943, LEIBELL, J.) 53 F. Supp. 829, 830.

Since the question whether interest was properly awarded from the time of defendant's receipt of the moneys is a question of New York law, involving an interpretation of § 480 of the Civil Practice Act of that state, and of state decisions both before and subsequent to its adoption, this Court will accept the determination of that law by the Court of Appeals for the Second Circuit. In *Huddleston* v. *Dwyer* (1944) 322 U. S. 232, 237, this Court said:

> "The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts, cf. *Ruhlin* v. *New York Life Ins. Co., supra* [304 U. S. 202]."

Conclusion.

The decision below is not in conflict with any decision of this Court, nor with any decision of a court of appeals in the Second Circuit or elsewhere. On the contrary, the question of the statute of limitations was correctly resolved under the doctrine of *Bailey* v. *Glover,* to which this Court has steadfastly adhered.

The question whether the correct amount of interest was added is one of state law in which this Court, in the absence of extraordinary circumstances not shown here, accepts the decision of the intermediate appellate court.

The petition for a writ of certiorari should be denied.

Dated, New York, N. Y., November 12, 1951.

Respectfully submitted,

HAROLD HARPER,
Counsel for Respondent.

Office-Supreme Court,
FILED
DEC 7 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 377

SAMUEL M. LEVY,

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against

LEWIS M. DABNEY, JR., as Trustee of Associated Gas and Electric Company, Debtor, etc.,

Respondent.

PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: New York, N. Y., December 6, 1951.

APPEAL PRINTING CO., INC., 130 CEDAR STREET, NEW YORK, WO 4-3033

IN THE

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Respondent.

PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, SAMUEL M. LEVY, respectfully petitions for a rehearing of the denial on November 26, 1951 of his petition for writ of certiorari to the United States Court of Appeals for the Second Circuit.

POINT I

It was not previously argued that defendant has never been found guilty of fraud and that the Court below expressly rejected any such finding.

Respondent in his brief made the contention, not contained in the opinion of the Court below, that in New York breach of a fiduciary duty is fraud, citing the

Emmerich case, 300 N. Y. 417. Petitioner's counsel truly believes that the only reason this Court might have denied certiorari was the conviction that the *Emmerich* case did stand for the cited proposition, not previously dealt with in petitioner's brief for the reason that the Court below had not dealt with this aspect of the problem.

But the *Emmerich* case has no relevance whatsoever to the situation here at bar.

The *Emmerich* case merely stands for the proposition that a complaint couched in terms of fraud, unlike the complaint at bar, against a particular *express* trustee, may be held to be an action for fraud. But defendant here is not an express trustee, nor was the complaint couched in terms of fraud. Indeed, one of the cases on which the Court relied in *Emmerich* (300 N. Y. at 420) expressly held that when an express trustee, without suspicion of wrong, took excessive commissions in good faith, the statute of limitations began to run against him as soon as he was no longer an express trustee, though he was then a constructive trustee. Such action, remarkably similar to defendant's action here, did *not* constitute fraud, held the court. When a person is not an express trustee, as in the case at bar, "the running of the statute begins, and only actual or intentional fraud will be effective to suspend it." *Spallholz* v. *Sheldon,* 216 N. Y. 205, 209, and see cases cited at pp. 208-209 *ibid.* The New York Court of Appeals has consistently held, in addition, that those who were fiduciaries to a corporation could not be sued in fraud for misappropriation of corporate assets, even where the plaintiffs are trustees in bankruptcy. *Clarke* v. *Mayer,* 295 N. Y. 830 (1946); *Hastings* v. *Byllesby & Co. (Haystone),* 293 N. Y. 404 (1944); *American Cities Power & Light Corp.* v. *Williams,* 74 N. Y. S. 2d 369 (Sup. Ct. 1947), unan. affd. 80 N. Y. S. 2d 357

(1st Dept., 1948), leave to appeal denied, 298 N. Y. 931 (1948). For a review of earlier cases, see *Shultz* v. *Manufacturers & Traders Trust Co.,* 128 F. (2d) 889 (C.C.A. 2d, 1942), cert. den. 317 U. S. 674.

POINT II

Respondent's brief affirmatively demonstrated the broad and erroneous scope of the decision below.

Respondent's brief (p. 6) reads as follows:

> "Fraud, of course, is a word capable of very broad meaning. As stated in *Connolly* v. *Gishwiller* (7 C. A. 1947), 162 F. 2d 428, cert. denied 332 U. S. 825 (p. 433):
>
> > 'Fraud, in its general sense, comprises all acts, omissions and concealments, involving a breach of legal or equitable duty, trust or confidence and resulting in damage to another.'
>
> " 'Fraud', as used in *Bailey* v. *Glover* [21 Wall. 343 (1874)], is obviously used in a broad and generic sense and not in the narrower sense of deceit."

Surely this "general sense" definition of fraud, used in a case having no connection with a limitations problem, was never intended to be a basis for the suspension of the running of the statute of limitations. Under the doctrine of the *Connolly* case, *every* cause of action—since there is no cause of action which does not fit within this definition—could be considered an action for fraud which would suspend the running of the statute. The decision below narrows such doctrine only to the extent that trustees are the only ones who can take advantage of it (R. 91), a distinction without any rational basis. Surely this Court never intended the *Bailey* case to go that far.

The rule of *Bailey* has nowhere been more accurately stated than in respondent's brief, page 5, when he states it as being "that where there has been no negligence or laches on the part of a plaintiff in coming to the knowledge *of the fraud which is the foundation of the suit,* and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him, and that that is so although the party committing the fraud has made no special effort to conceal it." (Emphasis supplied.) Petitioner's point is simply that fraud is *not* the foundation of the suit here. As respondent himself states in his brief, page 4, the claim in this case is "* * * one for money had and received * * * sounding in contract". Such a claim cannot be brought within the doctrine of *Bailey.*

This Court has held that in such a case the statute does begin to run at once. *Avery* v. *Cleary,* 132 U. S. 604. Therefore the decision below was in conflict with *Avery* v. *Cleary.*

CONCLUSION

This petition for a rehearing should be granted and the petition for a writ of certiorari should be granted.

Dated: New York, N. Y., December 6, 1951.

Respectfully submitted,

HERBERT MONTE LEVY,
Attorney for Petitioner.

Certificate of Counsel

HERBERT MONTE LEVY, attorney and counsel for petitioner, hereby certifies that the above petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds set forth in Rule 33(2) of this Court, i.e., "substantial grounds available to petitioner although not previously presented".

HERBERT MONTE LEVY,
Attorney for Petitioner.

Office-Supreme Court, U.S.
FILED
DEC 15 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 377

SAMUEL M. LEVY,

Petitioner,

against

LEWIS M. DABNEY, JR., as Trustee of Associated Gas and Electric Company, Debtor, in a Proceeding for Corporate Reorganization under Chapter X of the Bankruptcy Act,

Respondent.

RESPONSE TO PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HAROLD HARPER,
Counsel for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 377

SAMUEL M. LEVY,
Petitioner,

vs.

LEWIS M. DABNEY, JR., as Trustee of Associated Gas and Electric Company, Debtor, in a Proceeding for Corporate Reorganization under Chapter X of the Bankruptcy Act,
Respondent.

RESPONSE TO PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner says that there should be a rehearing upon his petition because in his original brief he had not dealt with the proposition that in New York breach of a fiduciary duty is fraud. He says that this omission was due to the fact that the Court below had not dealt with this aspect of the problem.

It is true that in petitioner's original brief he seemed strangely unaware of the fact that faithlessness to a fiduciary duty might constitute fraud. It is far from true, however, that the Court below had not dealt with this aspect of the problem. The Court said [92] "Could there be a more baseless appropriation of the *res* by constructive trustees?" And in interpreting this Court's decision in

Holmberg v. *Armbrecht* (1946) 327 U. S. 392, the Court below said [92]:

> "This we take to mean that in cases of 'fraud,' *used to include at least instances of the kind at bar,* when Congress does not choose expressly to say the contrary, the period of limitation set by it only begins to run after the injured party has 'discovered, or has failed in reasonable diligence to discover' the wrong." (Emphasis ours.)

And again [93]:

> "Indeed it would be monstrous if so bare-faced a taking of this corporation's funds as is here displayed were to escape restitution because the confederates had succeeded in keeping the transaction from detection for six years."

Hence, the Court below expressly held that a breach of fiduciary duty, whether in New York or elsewhere, not only constituted fraud, but constituted fraud within the meaning of *Bailey* v. *Glover* as that case had been interpreted by subsequent decisions of this Court. This holding was open to attack upon petitioner's original application for the writ, and it was petitioner's own choice to gloss it over.

The decision in *Emmerich* v. *City Bank Farmers Trust Company* (1950) 300 N. Y. 417, was not based upon any theory of the continuing liability of an express trustee. It was specifically based upon the New York Civil Practice Act, § 48, subd. 5,* which embodies in a statute substantially

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* "§ 48. ACTIONS TO BE COMMENCED WITHIN SIX YEARS.
"The following actions must be commenced within six years after the cause of action has accrued:

* * * * * * * * *

"5. An action to procure a judgment on the ground of fraud. The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.

* * * * * * * * *"

the same chancery rule* adopted judicially for the federal courts in *Bailey* v. *Glover*. The Court below [90] did not find it necessary to decide whether this case fell within that statute, which also would have had the effect of suspending the running of the statute of limitations until the discovery of the facts. The *Emmerich* case was cited by respondent simply for the proposition that a breach of fiduciary duty may constitute fraud when that term is used in the broad sense that must have been contemplated in *Bailey* v. *Glover*. Surely an express trustee is not the only kind of fiduciary who may be guilty of fraud. Respondent does not question that, had the fraud not been concealed, the statute of limitations would have begun to run when petitioner became a constructive trustee of the corporation's funds. The fraud, however, was concealed, and thus *Bailey* v. *Glover* applies.

The petition for rehearing of denial of a writ of certiorari should be denied.

Dated, New York, N. Y., December 12, 1951.

Respectfully submitted,

HAROLD HARPER,
Counsel for Respondent.

* The New York statute originally applied only to equitable causes. For its evolution see 2 N. Y. Rev. Stat. (1829) 301, § 51; Code of Remedial Justice (1876) § 382; New York Code of Civil Procedure (1920) § 382.

DEC 15
CHARLES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 377

SAMUEL M. LEVY,

Petitioner,

against

LEWIS M. DABNEY, JR., as Trustee of Associated Gas and Electric Company, Debtor, in a Proceeding for Corporate Reorganization under Chapter X of the Bankruptcy Act,

Respondent.

PETITIONER'S REPLY BRIEF, AND REQUEST FOR ADDITIONAL RELIEF, ON PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HERBERT MONTE LEVY,
Attorney for Petitioner,
170 Fifth Avenue,
New York 10, N. Y.

Dated: New York, N. Y., December 14, 1951.

APPEAL PRINTING CO., INC., 130 CEDAR STREET, NEW YORK, WO 4-3033

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 377

SAMUEL M. LEVY,

Petitioner,

against

LEWIS M. DABNEY, JR., as Trustee of Associated Gas and Electric Company, Debtor, in a Proceeding for Corporate Reorganization under Chapter X of the Bankruptcy Act,

Respondent.

PETITIONER'S REPLY BRIEF, AND REQUEST FOR ADDITIONAL RELIEF, ON PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner takes the unusual course of filing a reply brief on this petition for rehearing* because Respondent in his answering brief conceded the sole point at issue, and

* It is not clear whether a motion is necessary to permit the filing of this brief. If such a motion be necessary, Petitioner requests this Court to consider this brief as such a motion, based upon a concession newly made by Respondent which could not have been known to Petitioner before his receipt of Respondent's brief.

thereby demonstrated that certiorari should be granted and the judgment below reversed without further hearings.

Respondent conceded as follows:

> "*Respondent does not question that, had the fraud not been concealed, the statute of limitations would have begun to run when petitioner became a constructive trustee of the funds* [1938]. The fraud, however, was concealed, and thus *Bailey* v. *Glover* applies." (Emphasis supplied.) Response to Petition for Rehearing, p. 3.

Since no evidence was introduced to show concealment, and since the Court below expressly found that there had been no concealment,** the Respondent has conceded that the two year statute of limitations began to run in 1938 when defendant's receipt of the moneys made him a constructive trustee. Suit here was not brought until 1948. The action seems clearly barred.

This concession disposes of the case. Petitioner asks that certiorari be granted and the judgment below be summarily reversed because of this Court's decision in *Johnson* v. *Dye*, No. 332, October Term 1949. No brief opposing the granting of certiorari in that case having been filed, this Court granted certiorari and, apparently acting on the basis of this concession, immediately reversed the judgment below. 338 U. S. 864. The Court refused to grant a rehearing even when this concession was explained (Petition for Rehearing, Affidavit of Herbert M. Levy, Exhibit A). 338 U. S. 896. If Johnson's con-

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** In comparing the instant case with *Bailey* v. *Glover*, the Court below noted [91]:

> "* * * in each the defendant had done nothing to cover up his guilt * * *".

cession there enabled this Court to reverse without further hearing, surely Respondent's express concession here should enable this Court to reverse without further hearing.

The petition for rehearing of denial of a writ of certiorari should be granted and the judgment below summarily reversed.

Dated: New York, N. Y., December 14, 1951.

Respectfully submitted,

HERBERT MONTE LEVY,
Attorney for Petitioner.